SUPREME COURT, U. S.

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No. 526

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961.

SHELL OIL COMPANY,

*Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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## TABLE OF CONTENTS.


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Involved | 2 |
| Statutes and Regulation Involved | 4 |
| Statement | 4 |
| Reasons for Granting the Writ | 8 |
| Conclusion | 17 |
| Appendix A: | |
| Pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act Feb. 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717-717w | A-1 |
| Appendix B: | |
| Federal Power Commission Rules of Practice and Procedure, 18 C. F. R. 1.8, 1.37 | B-1 |
| Appendix C: | |
| Opinion of Fahy, Circuit Judge | C-1 |
| Judgment | C-12 |
| Opinion of Fahy, Circuit Judge, On Petitions for Rehearing | C-13 |
| Order Denying Petitions for Rehearing | C-17 |
| Order | C-18 |

## Table of Cases.


| | PAGE |
|---|---|
| *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945) | 14 |
| *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940) | 14 |
| *Public Service Comm. of the State of N. Y.* v. *F. P. C.*, D. C. Cir., 284 F. 2d 200 (1960) | 7, 11 |
| *Western Union Tel. Co.* v. *U. S.*, 2 Cir., 217 F. 2d 579 (1954) | 14 |


## Statutes.


| | |
|---|---|
| Natural Gas Act, | |
| § 7(c), 15 U. S. C. § 717f(c) | 2, 4 |
| § 15(a) 15 U. S. C. § 717n(a) | 14, 15, 16 |
| § 17(b) 15 U. S. C. § 717p(b) | 16 |
| § 19(a) 15 U. S. C. § 717r(a) | 3, 9, 10, 11, 13 |
| § 19(b) 15 U. S. C. § 717r(b) | 2, 4, 7, 12, 13 |
| 28 U. S. C. § 1254(1) | 2 |


## Rules.


| | |
|---|---|
| Commission's Rules of Practice and Procedure, (18 C. F. R. 1949) | |
| § 1.8 | 4, 17 |
| § 1.8(a) | 5 |
| § 1.8(a)(1) | 7, 15, 16 |
| § 1.8(a)(2) | 7 |
| § 1.8(b) | 7 |
| § 1.8(f)(2) | 5 |
| § 1.37 | 4, 16 |
| § 1.37(f) | 8, 14, 16 |

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in case No. 15,366 on June 15, 1961, rehearing denied August 3, 1961.

### Opinions Below.

The opinion of the Court of Appeals is not yet reported. The opinion and the order denying rehearing are reproduced in Appendix C hereto. The orders of the Federal Power Commission (R. 39-40, 69-73, 84-87) are reported at 21 F. P. C. 396, 581 and 22 F. P. C. 95.

## Jurisdiction.

The judgment of the Court of Appeals was entered on June 15, 1961. Rehearing was denied on August 3, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §19(b) of the Natural Gas Act, 15 U. S. C. §717r(b).

## Questions Involved.

Respondent, by the filing of a notice "that it intervenes in these proceedings" (R. 38), attempted to intervene as a matter of right in a proceeding before the Federal Power Commission. The proceeding involved applications by independent producers of natural gas, including petitioner, for certificates of public convenience and necessity under §7(c) of the Natural Gas Act (15 U. S. C. §717f(c)) to make sales in interstate commerce of natural gas for resale. The gas, to be produced and initially delivered in Texas, was to be transported to and ultimately consumed in the Chicago area. None of the gas was destined, directly or indirectly, to the State of New York, to which State respondent's regulatory function is restricted. The Federal Power Commission denied this attempted "of right" intervention, but granted limited participation to enable respondent to show the interest on which it based its claim to intervene (R. 41). Respondent did not apply for rehearing on the order denying the attempted "of right" intervention within 30 days after the issuance thereof. However within such 30 day period, respondent filed an application for subpoenas in which it stated that it did not concede the propriety of the order "denying our intervention herein" and that it did not recede from its position that it was an intervenor (R. 42, 47).

The Commission denied the motion for subpoenas (R. 69-73), stating that it did not deem respondent's intervention to be "reasonable, appropriate, or necessary in the public interest as a remedy to accomplish the objectives which it states" (R. 72). Within 30 days after the issuance of this latter order, but more than 30 days after the order denying attempted "of right" intervention, respondent applied for reconsideration of both of such orders (R. 74-83). Reconsideration was denied (R. 84), and respondent's petition in the court below followed.

The Court of Appeals, on the premise that the Commission's rules governed, held that in the case of a State Commission, intervenor status is acquired merely by filing a notice of intervention (App. C, pp. 5, 6, 7). The court did not, therefore, reach the other issue (strenuously urged below by respondent) as to whether respondent had established a sufficient interest that it should have been granted permissive intervention. This latter question, not having been reached by the court below, is not involved here. The instant questions involve solely the conclusion of the Court of Appeals in reversing the Commission on the issue of "of right" intervention by a State Commission in a proceeding before the Power Commission where the gas involved is not destined, directly or indirectly, to the State in which the would-be intervenor has regulatory jurisdiction.

The questions presented are:

1. Whether the Court of Appeals had jurisdiction to entertain the "of right" intervention issue where respondent did not comply with §19(a) of the Natural Gas Act [15 U. S. C. §717r(a)] in that it failed to apply for rehearing within 30 days after issuance of the order denying "of right" intervention?

2. Whether, assuming an affirmative answer to the foregoing question, the Court of Appeals exceeded the appropriate scope of its review power in rejecting the Federal Power Commission's construction of its own rules, and substituting its judgment for that of the Commission?

## Statutes and Regulations Involved.

This case involves §§15(a), 19(a) and 19(b) of the Natural Gas Act [15 U. S. C. §§717n(a), 717r(a) and (b)] and §§1.8 and 1.37 of the Commission's Rules of Practice and Procedure [18 C. F. R. §§1.8 and 1.37 (1949)]. The pertinent sections of the Natural Gas Act are reproduced in Appendix A hereto. The pertinent sections of the Commission's rules are reproduced in Appendix B hereto.

## Statement.

Petitioner filed an application with the Commission under §7(c) of the Natural Gas Act [56 Stat. 83, 15 U. S. C. §717f(c)] seeking a certificate of public convenience and necessity to sell to a pipeline company natural gas to be produced in Texas. The gas is to supply the pipeline's customers in the Chicago area and elsewhere in the midwest. None of the gas is destined to the State of New York. By order dated February 20, 1959, the Commission consolidated petitioner's application with that of several other applications for certificates (R. 33-37).

Although none of the gas was destined to New York, respondent filed with the Commission on March 16, 1959 a "Notice of Intervention", the body of which reads in full (R. 38):

> "The Public Service Commission of the State of New York, a regulatory body of the State of New

> York having jurisdiction to regulate rates and charges for the sale of natural gas within said State, hereby gives notice that it intervenes in these proceedings."

On March 26, 1959, the Commission issued an order entitled "Order Permitting Limited Participation and Denying Intervention Pending Further Order" (R. 39-41).* In this order the Commission observed that the notice of intervention was "pursuant to Section 1.8(a) of the Commission's Rules of Practice and Procedure" (R. 39), and that (R. 40):

> "An examination of the aforesaid applications and petitions reveals that (1) no part of the natural gas proposed to be sold, transported and delivered will be transported, sold, delivered, resold or consumed within the State of New York; and (2) that none of the applicants own or operate, or propose to own or operate, any natural gas facilities within said State."

It appears clear that the foregoing order of March 26th denied respondent's claimed "of right" intervention. However, the order provides that "* * * in view of the possibility that [respondent] might have a real and valid but as yet undisclosed interest in the proceedings which it could support if given the further opportunity to so do", and permitted respondent to participate in the proceeding for the limited purpose of establishing, if it could, that it had such an interest as to warrant its participation as an intervenor (R. 41).

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* Section 1.8(f)(2) of the Commission's rules provides for action on petitions to intervene and states that "* * * the Commission will grant or deny such petition in whole or in part or may, if found to be appropriate, authorize limited participation." 18 C. F. R. §1.8(f)(2).

Respondent did not apply for rehearing on the March 26th order until May 27, or more than 60 days after its attempted "of right" intervention was denied.

For the purpose of a clearer understanding of the procedural steps, the following chronology of the more important events (all within 1959) is given:

February 20—FPC notice of applications, consolidation and date of hearing (R. 33).

March 16—Respondent filed notice of intervention (R. 38).

March 26—FPC order denying intervention "of right" but permitting limited participation to respondent (R. 39).

March 31—Hearing began on merits of certificate applications (respondent appeared at this hearing but tendered no witnesses nor documentary evidence to establish an interest) (R. 1, 14).

April 3—Hearing concluded on certificate applications (R. 95).

April 3—Respondent filed application for subpoenas for attendance of witnesses and production of documents (R. 42).

April 27—FPC denied respondent's application for subpoenas (R. 69).

May 27—Respondent applied for reconsideration of FPC's orders of March 26 and April 27 (R. 74).

July 16—FPC denied respondent's application for reconsideration (R. 84).

In respondent's petition for review in the court below it prayed that the orders of March 26, April 27 and July

16, 1959 be set aside (Pet. for Review, p. 12).* The court granted this relief and remanded the case for further proceedings. This means that the certificate proceeding which was concluded on its merits by the Commission's order of December 1, 1959 (Docket Nos. G-14829 *et al.*, 22 F. P. C. 979) which adopted the Presiding Examiner's decision of August 25, 1959 (Docket Nos. G-14829 *et al.*, 22 F. P. C. 982) issuing an unconditioned certificate to petitioner, must be reopened to permit full participation by respondent to present whatever evidence and argument it might choose to present.

In the court below the New York Commission argued first that as a State regulatory commission it was entitled to intervene as of right under §1.8(a)(1) of the Commission's Rules of Practice and Procedure (18 C. F. R. §1.8(a)(1)) by the mere filing of a notice of intervention; and that in any event it was entitled to permissive intervention under §1.8(a)(2) and §1.8(b) of the foregoing rules in that it had an interest which would be directly affected and that it would be bound by the Commission's action.

The Court of Appeals did not reach the second point argued by the New York Commission. Observing that the

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* The Commission filed a motion to dismiss this petition on the ground that the orders were not reviewable and that a would-be intervenor has no standing to petition for review as he is not a party to the proceeding. In a prior opinion involving this and two other cases, the court below held that a would-be intervenor is a party to the proceeding and is "aggrieved" within the meaning of §19(b) of the Natural Gas Act [15 U. S. C. §717r(b)] when his application to intervene is denied. *Public Service Comm. of the State of N. Y. v. F. P. C.*, D. C. Cir., 284 F. 2d 200 (1960). In that case the court below held that a would-be intervenor must comply with §19(b)'s sixty day jurisdictional limitation upon the time within which review must be sought, and a would-be intervenor whose application for intervention has been denied cannot await the final order upon the merits of the controversy and seek judicial review within 60 days thereof, as he is not a party to the proceeding in the full sense of the term and is not "aggrieved" by such final order.

consolidated cases before it "naturally are governed by the Commission rules", *infra*, App. C, pp. 4, 5, the Court of Appeals reversed the Commission's interpretation and application of its own Rules of Practice and Procedure. The court held that as to a State commission, intervenor status is acquired by the mere filing of a notice. *Infra*, App. C, pp. 5, 6, 7. The court appears to reason that the requirement that a State commission must be "*interested*", as that term is employed in §1.37(f) of the Commission's rules [18 C. F. R. §1.37(f)], refers only to a State commission "interested in utilizing the cooperative procedures of the Act", *infra*, App. C, p. 6, and concludes that "[t]he essence of the matter is that under the present rules the interest of a State Commission in intervening is shown when it files a notice of intervention * * *", *infra*, App. C, p. 7. One judge, although he concurred in the result, differed with the majority on the "of right" intervention question.

## Reasons for Granting the Writ.

The questions presented are of general importance in the interpretation and administration of the Natural Gas Act and the Commission's rules issued thereunder, and on the appropriate scope of judicial review of an agency's order interpreting and applying its own rules.

1. Although we strenuously urged the point in brief and oral argument, the Court of Appeals did not come to grips with the question of whether it had jurisdiction to entertain the question of "of right" intervention because respondent did not apply for rehearing within 30 days on the order which denied its attempt to intervene as a matter of right. Since the decision below rests solely on its conclusion that respondent acquired intervenor status by the

mere filing of a notice, the decision cannot stand if the court was without jurisdiction to entertain that question.

The court's opinion is silent on this jurisdictional issue.* We can only surmise that the court felt that once it concluded that respondent was entitled to "of right" intervention, its status as such was acquired upon filing the notice, and that ended the matter. If we have correctly surmised the court's reasoning, then we submit an erroneous conclusion was drawn by the court, because concluding that respondent was entitled to "of right" intervention did not resolve, but merely created, the question of whether respondent was required to comply with §19(a)'s requirement and apply for rehearing within 30 days after it was denied "of right" intervention.

On March 16, 1959, respondent, assuming it was entitled to intervene as a matter of right, filed a notice of intervention in which it informed the Commission that it "hereby gives notice that it intervenes in these proceedings" (R. 38). The Commission refused to accept the notice as an "of right" intervention, but instead treated the notice as a petition to intervene and issued its order of March 26, 1959 in which respondent was afforded the opportunity to prove, if it could, that it had such an interest which would serve as a basis for permissive intervention (R. 39). Respondent did not apply for rehearing on this March 26 order until May 27, 1959, more than two months after it was issued.

On April 3, 1959 (within 30 days of the order denying intervention), respondent did file with the Commission a document styled "Application for Subpoenas for the

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* The court in note 4, *infra*, App. C, p. 3, said: "In its application for subpoenas and for reconsideration Public Service Commission [respondent] consistently maintained that it acquired intervenor status by the filing of the notice of intervention." This, we submit, was not an application for rehearing.

Attendance of Witnesses and for the Production of Documents Pursuant to Rule 1.23" (R. 42-49). This document was not an application for rehearing. Aside from the fact that it does not conform to the requirements of §19(a) of the Natural Gas Act for an application for rehearing (App. A, p. 1), the prayer of the document makes this clear.* Moreover, by seeking subpoenas, respondent was merely attempting to establish that it had an interest which would warrant permissive intervention.

By not "conced[ing] the propriety of the order of March 26, 1959, *denying our intervention herein*" and by not receding from its position that "it is an intervenor in this proceeding as of right", respondent did not supply, it merely emphasized the need for, the application for rehearing. Yet it was not until May 27, 1959 (two months after the order "denying our intervention herein") that respondent filed an "Application for Reconsideration of Orders of *March 26* and April 27, 1959" (R. 74-83), a clear recognition by respondent that an application for rehearing was required on the order denying "of right" intervention, but an equally clear indication that it came about 30 days too late.

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* The prayer of the application for subpoenas reads (R. 47-48):

"For the foregoing reasons, we request that this application be granted and that the subpoenas, hereinabove requested, be issued.

"In making this request, however, the New York Commission does not concede the propriety of the order of March 26, 1959, *denying our intervention herein*, nor does it recede from its position -

"1. That, per the Commission's extant rule, it is an intervenor in this proceeding as of right;

"2. That its allegations of interest are sufficient to support its intervention without any additional showing; and

"3. That if any additional showing in support of its allegations is necessary, such showing may be made by reference to documents and records contained in the Commission's files." (Emphasis supplied here and throughout.)

In its belated application for rehearing respondent prayed (R. 78):

> "We therefore request reversal of *the Commission's order of March 26 denying our intervention* and further request the issuance of an order acknowledging the status of the New York Commission as a party-intervenor herein."

Section 19(a) of the Natural Gas Act affords to one aggrieved by an order of the Commission the right to "apply for a rehearing within thirty days after the issuance of such order" [15 U. S. C. 717r(a)]. The same section of the Act makes it clear that such an application is a jurisdictional prerequisite to review. It provides [*id.*]:

> "No proceeding to review *any* order of the Commission shall be brought by *any* person unless such person shall have made application to the Commission for a rehearing thereon."

It is submitted that §19(a)'s requirement that an application for rehearing be filed within 30 days after issuance of the order is jurisdictional to the right of review, and that this jurisdictional prerequisite is applicable to an order rejecting an attempted "of right" intervention. Such an order aggrieves the would be intervenor and entitles him to seek judicial review provided he timely complies with §19's requirements.

*Public Service Commission of N. Y. v. F. P. C.*, 284 F. 2d 200, *supra*, demonstrates the confused situation in which the decision below leaves the question of intervention in proceedings before the Federal Power Commission. In that proceeding, as here, respondent attempted to intervene as of right by filing a notice. There, as here, the Commission denied "of right" intervention but permitted "limited

participation" in a certificate proceeding. There, the Power Commission, by order dated March 26, 1959, denied application for rehearing and denied intervention. The New York Commission did not seek review of this order denying rehearing. However, after the Power Commission entered its order on the merits in the certificate proceeding, the New York Commission renewed its application for intervention and also sought rehearing on the Power Commission's order on the merits. These were rejected, and within 60 days of the rejection order, the New York Commission petitioned for review in the court below. The court dismissed the petition on the ground that the order denying intervention was a reviewable order and since the New York Commission did not seek review thereof within 60 days as required by (19(b) of the Act, it lost its rights and could not thereafter seek review either of the order denying intervention or of the final order on the merits.

Bearing in mind that the would be intervenor in the case at 284 F. 2d 200 is the same State commission which sought "of right" intervention in the instant case, and that in each case the same vehicle to get into a pending proceeding—notice of intervention—was employed, the court below, in the prior case, said (284 F. 2d at p. 204):

> "• • • We summarize: A would-be intervenor is a party to a proceeding in a limited sense, restricted to the proceedings upon the application for intervention; he is aggrieved by the denial of his application; he is not a party to the proceeding in the full sense of the term and is not aggrieved by the final order upon the merits of the controversy."

And earlier in the decision the court stated (*id.*):

> "It follows from the two foregoing conclusions that the New York Commission had a right to petition

> for review of the order of March 26th, which was the order which finally denied its application for intervention and denied reconsideration thereof. Since it had a right to file a petition at that point, the statute limited to sixty days the period within which it must exercise that right. Its failure to file such a petition was not rectified by the later renewal of the application to intervene and the petition to review the rejection of that application." [Footnote omitted.]

In the instant case the court below holds that a State commission becomes a party to the proceeding by the mere filing of a notice of intervention. Conceding, for the sake of argument, that that is true, does that mean that if the Power Commission nonetheless denies the attempted "of right" intervention, the would-be intervenor need not timely seek rehearing and judicial review of such an order? Only by an affirmative answer can we find any basis for the court below assuming, *sub silentio*, that respondent was not required to comply with (19(a)'s 30 day jurisdictional limitation upon the right to seek rehearing. But if the question is to be answered in the affirmative, how can the decision below square with the one by the same court at 284 F. 2d 200? There this same State commission was held barred from judicial review because it did not seek such review within the statutory period. But (19(b)'s 60 day limitation does not begin to run until "after the order of the Commission upon the application for rehearing", 15 U. S. C. 717r(b). Hence, if the would-be intervenor is not required to apply for rehearing on the order denying intervention, he would seem also to be relieved of (19(b)'s time limitation, a result directly contrary to the conclusion of the court below in its opinion at 284 F. 2d 200.

The foregoing demonstrates the need for this Court to review and to set at rest the issue raised in question 1.

2. The Court of Appeals exceeded the appropriate scope of judicial review of the Commission's order interpreting and applying its own Rules of Practice and Procedure. The court scrutinized the Commission's determination not with the view to ascertaining whether it was reasonable, but rather whether the court would have similarly construed the rules had it been sitting initially as the administrative agency.* Such an approach to the review function, particularly when a federal agency construes and applies its own procedural rules, transcends the appropriate scope of judicial review. *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940); *Boules* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945); *Western Union Tel. Co.* v. *U. S.*, 2 Cir., 217 F. 2d 579 (1954).

In his opinion on the question of "of right" intervention (*infra*, App. C, p. 8), Judge Danaher amply demonstrates that the Commission's determination was not alone reasonable, it was correct. Moreover, the plain words of the Commission's rules, especially when read in the light of §15(a) of the Natural Gas Act [15 U. S. C. §717n(a)], make clear that the Commission's construction was right.

Section 1.37(f) of the Commission's Rules of Practice and Procedure [18 C. F. R. §1.37(f)] provides:

> "*Intervention by State commissions.* Any *interested* State commission may, as a matter of right,

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* In its opinion on rehearing the court below said (App. C, p. 15):

> "It [the Power Commission] decided that under its rules, promulgated under express statutory provision for the governance of procedure, the New York State Commission did not acquire intervenor status by filing notice of intervention. In this, for the reasons explained in our main decision, we think the Power Commission was *mistaken*."

> intervene in *any* proceeding before the Federal Power Commission, as provided in §1.8."

The Court of Appeals construed §1.37(f) as applying only to a State commission interested in utilizing the cooperative procedures of the Act. Thus the court, while reading §1.8(a)(1) "as meaning what it says" (App. C, p. 5), refused to accord like treatment to the clear language of §1.37(f).

Section 15(a) of the Natural Gas Act [15 U. S. C. §717n(a)] provides in part:

> ". . . In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any *interested State*, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

The Act itself does not confer *of right* intervention upon anyone. It merely confers upon the Commission the power to prescribe rules pursuant to which "interested" State commissions may become a party. With that statutory basis as its authority, the Commission adopted §1.8 of its rules setting out the procedure pursuant to which those would-be intervenors *designated in and possessing the requisites of the Act* would be admitted as a party. It would have been redundant for the Commission in adopting §1.8(a)(1) to add "interested" to States and State commissions, because the Act itself imposed that limitation. Indeed, it could be said that under §15(a), the Commission has no power to admit an *un*interested State commission unless it could be found that in some way such a commission's participation may be in the public interest.

Assuming, but not conceding, that the court below was correct in concluding that §1.37(f) is limited to State commissions interested in utilizing the cooperative procedures of the Act, that does not mean that §1.8(a)(1) can be interpreted without regard to the provisions of §15(a) of the Act so as to authorize any State Commission, whether or not properly interested in a proceeding before the Power Commission, to intervene merely upon filing a notice. Just the contrary appears to be the case when the Commission's rules (§§1.8 and 1.37) are read in the light of the provisions of §§15(a) and 17(b) of the Act [15 U. S. C. §§717n(a) and 717p(b)].

Section 15(a) deals with "*any proceeding before it*" [i.e., the Federal Power Commission] and permits the Commission to admit "any *interested* State, State commission, municipality . . . [as] a party to *such* proceeding. . . ." Section 17 of the Act deals with cooperation between the Power Commission and State commissions. Section 17(b) of the Act authorizes the Power Commission "to hold *joint* hearings with any State commission" in certain instances [15 U. S. C. §717p(b)]. But neither §17 nor any other section of the Act prescribes standards for intervention in *joint* hearings with State commissions. Hence it was necessary when the Commission promulgated its rules dealing with joint hearings, which it did in adopting §1.37, to specify that State commissions seeking to intervene therein could do so by notice, provided they were "interested" State commissions. However, there was no need to specify such limitation in §1.8 which deals with proceedings held before the Power Commission sitting alone, as §15(a) of the Act makes clear that only "interested" State commissions may be admitted as a matter of right as a party to such proceedings.

We submit that the court below went out of its way, and at any rate far beyond the appropriate scope of its review power, in straining §1.8 to mean that *any* State commission having power to regulate gas rates within the State (and the same reasoning would have to apply to the untold number of regulatory bodies of *municipalities*), and irrespective of its interest in a pending proceeding, had the right to become a party by the mere filing of a notice to that effect.

## Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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